COURT, U. S.

No. 74-1366

In the

Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT AND SANDRA SCHAEFER, et al.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT

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Petitioners, Robert and Sandra Schaefer, et al., being plaintiffs, claimants and representatives of a class of all persons who purchased Hercules-Galion stock from July 1965 through August 1967, on behalf of themselves and all members of that class, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case, (Court of Appeals No. 73-2128,) on January 30, 1975, but only that portion of such opinion affirming that portion of the final order of the United States District Court in the Northern District of Illinois which dismissed petitioners' Count II, an antitrust action.

OPINIONS BELOW

The original opinion of the District Court for the Northern District of Illinois is reported as follows: *Schaefer, et al* v. *First National Bank of Lincolnwood, et al*, 326 F. Supp. 1186. This dismissal appeared to be based soley on the grounds of incapatibility of an anti-trust claim with a Securities Act claim as opposed to any failure to allege a valid cause of action under the Sherman and Clayton Anti-trust Acts. At that time no effective order making the ruling final under Rule 54b was entered. A group of additional defendants was named and joined in the litigation in October, 1972. Judge McMillen in his June 25, 1973 order and opinion, not reported, then dismissed this anti-trust claim as to the October 1972 defendants (and respondents herein) based on Judge Decker's 1970 opinion. Judge McMillen's Rule 54(b) order of September 13, 1973 extends to the entire June 25, 1973 decision and Judge Decker's earlier decision. Thus the validity of plaintiffs' anti-trust claim is at issue with respect to all Appellees and respondents in this Petition for Certiorari. A copy of Judge McMillen's opinion is set forth in the Appendix to this Petition, infra.

This civil action originated from a criminal indictment charging an identical manipulation of the stock in question, which indictment was returned in the Southern District of New York on August 23, 1967, sub. nom *U.S.* v. *Projansky, et al*, 67 CR 729. A discussion of the criminal case and the underlying facts of this case is contained in the appeal therefrom, *U.S.* v. *Projansky, et al*, (Second Circuit, 1972) 465 F.2d 723, CD, 93 S.CT. 432 affirming all convictions.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered January 30, 1975 (See Appendix). A rehearing *en banc* was sought by one of the respondents herein, Rodman and Renshaw, on other issues not the subject of this Petition for Certiorari but which are expected to be the subject of a Petition for Certiorari to be separately filed solely on those issues by those respondents. That petition for *en banc* rehearing was denied. No rehearing or extension of time was either sought or granted with respect to the issue on which these petitioners request Certiorari. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

The sole question presented in this Petition for Certiorari is whether a classical manipulation of a stock from and to a certain price, which manipulation states a cause of action under Section 1 of the Sherman Act, is not maintainable solely because the same cause of action constitutes or is alleged as a cause of action under the Securities Acts. The complaint in this case is in three counts. It alleges a conspiracy to raise and maintain the trading price of Hercules-Galion stock on the American Stock Exchange as a direct violation of the Sherman Act ban on conspiracies and combinations to fix and maintain the prices of goods in interstate commerce. The complaint alleges in Count II a per se violation of that statute together with a private remedy in treble damages under Section 4 of the Clayton Anti-trust Act. Count II mirrors Count I which alleges the same set of facts as violations of the Securities Exchange Act.

One of the most important and timely issues of our time is presented here in the application of anti-trust remedies to classical market manipulations. The importance of anti-trust application and enforcement is one of the most important topics of our legal and economic climate today.

At issue are the lower Courts' interpretation of the interaction between the Securities Exchange Acts and the Anti-Trust Acts and their conflicts with and misinterpretation of U.S. Supreme Court and Circuit Court decisions in reaching the decision from which we seek relief.

APPLICABLE STATUTES

ANTI-TRUST LAWS

Sec. 1 Sherman Anti-Trust (15 USC 1)

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be ill[illegible]. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby [55-1-7 of This Title] declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Anti-Trust Act (15 USC15)

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

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respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee

SECURITIES LAWS

Sec. 28 Securities Exchange Act of 1934

Section 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity, but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions), of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

STATEMENT OF THE CASE

This civil action alleges stock manipulation under the Securities Acts of 1933 and 1934 as Count I, the Sherman Act as Count II and common law fraud as Count III. The factual basis of each count is identical. Suit was filed in the U.S. District Court for the Northern District of Illinois on February 9, 1969. The New York criminal indictment was returned on August 23, 1967.

The original criminal indictment involved only individuals who were composed of three directors of the company manipulated, Hercules-Galion, several individual stockbrokers from New York and Chicago, and the President and Chairman of the Board of the First National Bank of Lincolnwood plus other private individuals. The allegations involved a conspiracy to manipulate and the manipulation of the stock of Hercules-Galion on the American Stock Exchange for the period of July, 1965 through August, 1967. The conspirators were charged with the conspiracy and manipulation of the stock upwards from a price of $6 to $12 per share and further attempt to manipulate it from $10 to $16 per share. The stock actually reached the first objective of $12 per share and later reached a price of $14 and a fraction but never reached the $16 per share figure. The conspiracy called for maintaining the price at or above $12 for a considerable period of time. The purpose of maintaining the inflated price was to permit the negotiation and consummation of a merger at the inflated price. The merger had been agreed upon but was never consummated due to a sharp rise in the market price of the other firm. The criminal indictment did not name any business defendants, but did name some unindicted co-conspirators who cooperated with the government. This civil complaint included the unindicted

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co-conspirators, the defendants in the criminal case, the business defendants who were alleged to be controlling persons of the criminal defendants; the corporation itself, Hercules Galion, was named as a defendant in 1970 and two sets of various individual and business defendants were named as additional defendants in 1972. Both of the 1972 groups of defendants were dismissed by Judge McMillen, on their motion, and, on appeal, the dismissal was affirmed as to one group and reversed as to the second group, thus restoring the second group of defendants back into the case. Additional evidence ascertained in discovery and only peripherally suggested in the criminal trial was the attempt of the corporation Hercules-Galion to enter into a merger at the time the stock was near its apex despite declining earnings.

Several defendants pleaded guilty to the criminal charge, others were convicted and two were either acquitted or not retried after a hung jury. The U.S. Attorney asserted that the general public lost approximately 4 million dollars as a result of this manipulation. The amount of damages is in dispute in the case below. All persons convicted received extremely light jail sentences; the most serious is believed to have been one year. Most of the sentences ranged from 3 months to 6 months. The manipulation involved the classical old time form of a group of people, including brokers, creating a boiler-shop type operation of the stock by "painting the tape" in a masterful, coordinated effort between several brokerage houses in New York and Chicago, and pushing it with rumor and story. Some of the conspirators took money and free stock secretly in order to promote the manipulation. It should be noted that in the decision of the Seventh Circuit Court of Appeals, the court determined

that the president and chief operating officer of the company, Hercules-Galion, Charles Meyers, who is also a director (the fourth of seven directors), was considered by the court to have had a deep involvement in the conspiracy. Meyers had not been named by the U.S. Attorney and was part of the second group of 1972 defendants who were dismissed by Judge McMillen and restored to the case by decision of the Seventh Circuit.

These petitioners seek review only from so much of that order of the Seventh Circuit Court of Appeals that affirms the dismissal by the District Court of Count II, the anti-trust count alleged by the plaintiffs, involving the anti-trust violations. There seems to be no doubt or dispute about the fact of the manipulation; there is disagreement as to the persons who are responsible for it and whether the anti-trust laws may be applied in addition or in lieu of the securities laws.

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REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION OF THE ANTI-TRUST LAWS TO A SECURITIES PRICE-FIXING SITUATION IS AN IMPORTANT LEGAL ISSUE FOR THE COURT TO RESOLVE.

The emphasis both in Congress and in the economic climate of our times is for the application of anti-trust laws both as a historic basis founded in law, in statute and in economic necessity for the preservation of our way of life. The issue here also involves a very narrow but very important overlap of Anti-Trust and Securities Laws as well as the question of implied repeal, as discussed more fully hereafter.

It is quite apparent from the status of individuals involved in this conspiracy and manipulation, brokers, bankers, presidents of corporations, officers and directors, that the penalties of the securities laws are no deterrent whatsoever to active, old time securities manipulation. Apparently, high level people are still willing to take the risk of a slap-on-the-wrist jail sentence which has become the vogue and practice in return for the chance of reaping large financial returns which, even though later detected, will not result in financial regurgitation of the benefits for many years thereafter and then usually only at a compromise of the original amount taken.

We do not propose a situation where there is wide-spread application of the anti-trust laws to securities violations that result from negligent or intentional non disclosure of information and other violations prohibited by Section 10(b) and Rule 10(b)5. We are dealing with a narrow spectrum of cases that involve classical, insidious

market manipulations in the worst sense. Where such clear, obvious market manipulations and price-fixing also fall within the ambit of the anti-trust laws there is no reason to deny the statutory remedy which falls clearly within the language of the Sherman and Clayton Acts. To permit the decision of the Seventh Circuit to stand would be a denial of rights under the Sherman Act and encourage the same type of fraud on the part of individuals willing to take the chance and institutions so interested in additional revenue that they are willing to close their eyes to the activities of their controlled persons. Based on most settlements and recoveries the application of treble damages probably would have no greater result in the average case than restoring the losses in full to the people involved. The practical results in the reported cases that do not have the benefit of these laws do not permit effective full recovery.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS INCONSISTENT WITH AND MISCONSTRUES THE SUPREME COURT DECISION IN U.S. vs. PATTEN, 226 U.S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1912).

The Seventh Circuit, in distinguishing Patten from the instant case, has misinterpreted, misconstrued and misapplied that Supreme Court decision.

Patten was a criminal action under Sec. 1 of the Sherman Act charging a conspiracy to restrain trade by way of a price fixing scheme in the trading of cotton on the New York Cotton Exchange. The complaint detailed an attempt by defendants to create excessive artificial prices in the cotton commodity by a corner in the cotton market. The court held that the attempt to control prices in

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cotton by the methods charged in the complaint did constitute a valid criminal action under the Sherman Act, and reversed the sustaining of the demurrer to the complaint by the District Court. With respect to arguments that the Sherman Act is restricted to certain restraints at common law, the court quoted *Standard Oil v. United States*, 221 U.S. 1, 59 as follows:

> "'The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense."

The court further defined the breadth of Section 1.

> Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints: as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein.
> (all 57 L.Ed. at p. 341)

The opinion contains additional language that applies to the instant stock market manipulation scheme. The instant complaint alleges conduct on the part of defendants that tended to stimulate the market relative to Hercules-Galion stock and thereby create an artificial price and demand.

In *Patten* it was argued that the market corner tended to stimulate competition as opposed to suppressing it and therefore was not within the restraint of trade concept of the Sherman Act. In rejecting this the Court stated at p. 341 (L.Ed):

> "It well may be that running a corner tends for a time to stimulate competition: but this does not prevent it from being a forbidden restraint for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of completion."

Noting that the ultimate objective of the corner in the supply of cotton was the enhancement or the fixing of the price for the commodity upon the Exchange, the Court further stated on p. 341:

> "The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy *upon the attainment of which is conceded its success depended."

The close analogy between a commodity market cornering scheme and a stock market manipulation scheme as a method to control prices in violation of the Sherman Act was indicated by dictum in a subsequent Supreme Court case, *Board of Trade of Chicago* v. *Olsen*, 262 U.S. 1, 43 S. Ct. 470, 67 Law Ed. 839 (1923). This decision rejected an attack on the constitutionality of the Grain Futures Act of 1922 and the opinion recites that one of

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the evils intended to be prevented by the statute was the "prevention of manipulation of prices or the cost of grain by dealers or operators of the Board."

The court cited the above *Patten* case as the decision which brought the control of prices on the Exchange by means of a market corner within the prohibition of the Sherman Anti-Trust Act. Using then the close analogy between a market cornering scheme and a manipulation scheme as legally identical methods for achieving control prices, the court sustained its position that both evils constitued a direct burden on commerce as follows on p. 851-2:

> "If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interestate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."

The Seventh Circuit decision in the instant case has failed to properly apply *Patten* to the instant case.

III.

THE SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS IN THE SAME GENERAL AREA OF RESOLVING LIMITED JURISDICTION OF ANTI-TRUST LAWS IN CERTAIN AREAS THAT NARROWLY OVERLAP WITH SECURITIES LAWS.

Cargill, Inc. v. *Board of Trade of the City of Chicago*, 164 Fed. 2d 820 (7th Cir. 1947) was an anti-trust action

charging a price fixing conspiracy by reason of ban by the Board on certain futures contracts. The trial court dismissed the action and the Seventh Circuit Court affirmed but on the ground that the acts charged in the complaint were not, in fact, price fixing within the meaning of the Sherman Act. The court stated, however, that if the acts charged had been price fixing the court would have sustained the complaint as stating unreasonable restraint prayed under the Sherman Act, stating on p. 823:

> "We have been cited cases such as *United States* v. *Socony Vacuum Oil Co., Inc., et al* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, and *United States* v. *Trenton Potteries Company et al.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989. These cases do not define and delineate what is price fixing. They go only to the proposition that if there is price fixing, it is *per se* an unreasonable restraint of trade."

Stock market manipulation schemes, notwithstanding their general prevalence in the market in recent years, have rarely found their way into reported decisions. Such a scheme, however, by way of its creating an artificial price for stock, either up or down, through increased activity is but another price control scheme banned by the Sherman Act. The analogy with the foregoing decisions is too close for any other conclusion.

The Circuit Court decision also is in conflict with and misinterprets the case of *SSIF, Inc.* v. *Transport Association of America*, 191 F.2d 658 (DC, Cir. 1951)

This securities case has all the elements actionable under the Sherman Act. The question here is whether this status was in any way altered in 1933 and 1934 by the Securities Act. This issue exists here as elsewhere

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in a context that an implied repeal of the antitrust laws is to be strongly disfavored.

The key is of course Sec. 28 of the 1934 Act, together with the comparable language of Sec. 16 of the 1933 Act which preserve "all other rights and remedies that may exist at law or in equity." Defendants contend this language is limited to state securities rights and remedies such as blue sky laws and common law remedies existing on or before the passage of the Securities Acts.

Of course, these provisions preserve state remedies, but it is simply wrong to conclude that only state remedies are preserved. The words "all" or "may" clearly indicate a congressional attempt (1) to preserve any and all remedies, federal or state and (2) not to decide the extent of such remedies, a judicial, not a legislative function. In short, *Congress intended no bar of the door to any remedy, state, federal or otherwise.* Thus, if any remedy existed under the Sherman Act for market manipulation as we have shown, it survived, so far as Congress was concerned, the 1933 and 1934 Securities Acts.

This would seem dispositive of the argument except that Judge Decker followed by defendant's counsel have seized upon the single damage limitation of Sec. 28 as an instrument of antitrust repeal in this area. To state the proposition is to see its error; it is akin to suggesting that a hand shovel is made to move a mountain. This damage limiting provision is most reasonably construed to apply to the legislation of which it is a part, the 1934 Act. The subject of how it applies, e.g., punitive damages and the extent of application, to the 1933 Act and the pendant common law fraud liability is a subject of much legal debate but not an issue in this appeal.

To extend this provision to an independent statutory framework such as the antitrust laws, absent very specific direction by Congress, is judicial legislation pure and simple.

To support the argument that the antitrust laws are abrogated in the manipulation area by the Sec. 28 damage limitation provision, defendants rely on a group of cases cited by Judge Decker. Particular reliance was placed upon *S.S.W., Inc.* v. *Air Transport Association of America*, 191 Fd.2d 658 (D.C. Cir. 1951) which involved the regulated air transport industry and application of the Sherman Act. Plaintiffs sued under the Sherman Act for injunctive and treble damage relief against a group of mainly scheduled air lines. The court opinion distinguished the premises of this case plus others cited by Judge Decker and the defendants in terms of the type of regulated industry involved. A regulated industry there meant those such as public utilities where free competition was limited or abrogated in preference to a governmental grant of monopoly power, all in the public interest. As stated on p. 661:

> "The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an "agency authorized to supervise almost every phase of the regulated company's business".

The securities industry is of course a regulated industry, but not in the sense that free competition is suppressed in the public interest. The exact opposite is of course true with the result that any kind of free market suppression such as market manipulation is banned by the Securities Acts and as always by the antitrust laws.

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The amazing point however, is *notwithstanding the permitted monopoly area of S.S.W. Inc., the court there held that plaintiffs had a valid antitrust claim for treble damages.* It stated squarely in line with plaintiffs' argument here the following on p. 664:

> "What we are saying is that *the same set of facts may give rise to both a violation of the Civil Aeronautics Act and a violation of the antitrust laws. Although the second does not necessarily follow from the first but is bottomed upon its own statutory standards, the antitrust remedy of treble damages is not defeated by the fact that the Civil Aeronautics Act is also violated*".

The principal factor there was a remedy saving clause in the Civil Aeronautics Act like in Sec. 28 here. A second factor was the absence of a specific damage provision in the Act which is also similar to the instant matter. No specific damage provisions are provided in Sec. 17 of the 1933 Act and 10(b) of the 1934 Act, the primary bases for Count I here.

Furthermore, the court did not decide for the purposes of this decision whether or not plaintiffs had any kind of damage remedy for violations of the Civil Aeronautics Act. It merely decided as plaintiffs contend here that the two violations could and did exist side by side.

A stock market manipulation as alleged here is unique in that it combines the elements of Securities Acts fraud and a price fixing conspiracy under the Sherman Act. *There are of course many potential actions under Sec. 10(b) and Sec. 17 that would not contain conspiracy, price fixing* violations of the Sherman Act.

IV.

THE SEVENTH CIRCUIT DECISION AFFIRMS A LOWER COURT OPINION THAT IS IN DIRECT CONFLICT WITH OTHER OPINIONS IN THIS DISTRICT AND IN OTHER CIRCUITS.

Judge Decker's 1970 decision in this cause is a lonely exception to other decisions in this district and other circuits, which, while citing the decision, reached the exact opposite conclusion in permitting punitive damages to be recovered in a securities action so long as the punitive damages were recoverable under another count not containing securities allegations. The other decisions dealt mainly with common law fraud.

In this district, Judge Austin so decided in *Burkhart* v. *Allson Realty Trust*, 363 F. Supp. 1286 (N.D.Ill. - 1973). In a 10 (b) securities fraud action pp. 1290-2, Judge Austin analyzed the matter, including Judge Decker's *Schaefer* opinion and concluded that punitive damages are recoverable under the pendent count as part of Illinois common law fraud. The base rationale was that §28 of the 1934 Act expressly reserved state rights and remedies.

Punitive damages were held recoverable by the Tenth Circuit in *Young* v. *Taylor*, 466 F 2nd 1392 (1972) at pp. 1337-8, citing, but also disagreeing with, Judge Decker. Likewise, in the Southern District of New York in a vast securities fraud litigation, *In Re Caesar's Palace, Securities Litigation*, 360 F.Supp. 366, 393-4 (1973), punitive damages were held recoverable under the pendent count. The Court relied on a prior case from that district, *Gann* v. *BernzOmatic*, 262 F.Supp. 301 (S.D.N.Y.—1966) and the Tenth Circuit decision, *Young* v. *Taylor*, *supra*.

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The Fifth Circuit put it succinctly when it stated in *Coffee* v. *Permian Corp.*, 474 F.2d 1040 (1973) another 10 (b) fraud action at p. 1044

> "* * * Federal law is not clear concerning exemplary damages in 10b-5 lawsuits, but that need not trouble us here. By way of pendent jurisdiction a violation of state law is also present and it is well established that exemplary damages may be awarded if allowable under state law when a state law violation is joined with the 10b-5 complaint. *Young* v. *Taylor*, 10 Cir. 1972, 466 F. 2d 1329. See also *Herpich* v. *Wallace*, 5 Cir. 1970, 430 F. 2d 292."

One cornerstone of Judge Decker's denial of the antitrust count was his belief that punitive damages could not be recovered in a securities action, even in a non-securities count. That is clearly refuted by the foregoing decisions allowing punitive damages under pendent common law counts. Therefore, the treble damages allowed under the antitrust laws would comport with those decisions.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition of Certiorari brought herein by Robert Schaefer, et al., and the class represented solely on the issue of the application of the Sherman Anti-trust Act to a conspiracy to fix the price of a security.

Respectfully submitted,

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APPENDIX

DECISION ON MOTION OF DEFENDANT RODMAN & RENSHAW, INC., BY JUDGE McMILLEN ON JUNE 25, 1973

The defendant Rodman & Renshaw Inc., has now filed a motion for judgment on the pleadings, having previously failed in its motion for summary judgment (order entered January 9, 1973). Although successive motions of this kind are to be discouraged for various reasons, these reasons do not require a preemptory denial of the motion. In this particular instance we find the motion to be well-founded.

The allegations of the Amended Complaint against this defendant are too conclusory to satisfy the specific pleading requirement of F.R.C.P. 9(b). *Segal* v. *Gordon*, 467 F. 2d 602 (2d Cir. 1972); *Robison* v. *Caster*, 356 F. 2d 924, 927 (7th Cir. 1966). We can only assume that the plaintiffs, despite the lengthy history of this case, have no specific evidence of fraud or conspiracy against Rodman & Renshaw Inc., other than the acts of its departed employee Nagorsky. Fortuitously for Rodman & Renshaw, Nagorsky left more than three years before the Complaint was filed, and no concealment by Rodman & Renshaw is alleged.

We see no reason not to give retroactive effect to *Parrent* v. *Midwest Rug Mills Inc.*, 455 F. 2d 123 (7th Cir. 1972). The Illinois statute on which it is based was first enacted in 1953, and thus has been part of the Federal law since then, only recently declared. Therefore the requirements for non-retroactivity laid down by the Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) have not been satisfied in the case at bar. Cf. *Dasho* v. *Susquehanna Corp.*, 461 F. 2d 11, 21 (7th Cir. 1972), *cert. den.*, 92 S. Ct. 2496, 2498 (1972).

It is therefore ordered, adjudged and decreed that the motion of defendant Rodman & Renshaw Inc. for judgment on the pleadings is granted, and judgment is entered in its behalf on the First Amended Complaint, as amended.

ENTER:

/s/ THOMAS R. McMILLEN
Judge U.S. District Court

June 25, 1973

DECISION ON MOTIONS TO CLARIFY PREVIOUS ORDERS AND TO MAKE ORDERS OF JUNE 25, 1973 FINAL AND APPEALABLE BY JUDGE McMILLEN ON SEPTEMBER 13, 1973

Plaintiffs have moved for a clarification of our two orders entered June 25, 1973 which dismissed the Amended Complaint as to certain defendants. Plaintiffs assert that there are irreconcilable differences between the two orders and that the status of the Amendment filed in 1972 is unclear. On the latter point, we ruled on June 25, 1973 that "the Amendment filed October 18, 1972 to the First Amended Complaint is stricken." That was intended to dispose of the Amendment as to all defendants added by it and needs no further elaboration.

Plaintiffs also contend that we ruled inconsistently on June 25, 1973 concerning the application of the statute of limitations to defendant Rodman & Renshaw and to the defendants added by the 1972 Amendment. In our order of January 9, 1973, Rodman & Renshaw was denied summary judgment on the ground of the 3-year limitation because the complaint contained allegations that a conspiracy continued until at least August 23, 1967, within three years of the filing of the original complaint. Aside from the alleged conspiracy, however, the statute had run as to Rodman & Renshaw when its participating employee Nagorsky departed in 1965, and it was not tolled by fraudulent concealment. In the subsequent order of June 25, Rodman & Renshaw was granted judgment on the pleadings on the ground that the conspiracy allegations failed to meet the requirements of F.R.C.P. 9(b).

Also on June 25, we dismissed as to the defendants added by the 1972 Amendment on the ground that plaintiffs had not exercised due diligence after 1967 to toll the running of the 3-year statute as to those defendants. Plaintiffs did not contend that the non-discovery doctrine, rather than the fraudulent concealment doctrine, tolled the statute as to Rodman & Renshaw. It was not raised

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in connection with the January 9 order, nor was it raised in the briefs preceding the June 25 order. The issue presented as to Rodman & Renshaw was fraudulent concealment and plaintiffs lost. Plaintiffs had an additional ten days after June 25, 1973 to take the next step and raise the legal issue of non-discovery. *Swan* v. *United States*, 327 F. 2d 431, 433 (7th Cir. 1965), *cert. denied*, 379 U.S. 852 (1964). However, they waived it when they delayed until filing the instant motion on July 17. If this appears to be an unreasonably strict approach, one need only look at the number of motions and orders filed in this case. Even complex litigation must be brought to an end someday.

We note in passing that we did not rule, as Rodman & Renshaw contends, that the non-discovery doctrine does not apply where derivative liability is alleged. We did not reach this point because it was not timely raised.

Plaintiffs finally contend that since they found out about the involvement of defendant Charles Myers from two depositions which could not have been taken before 1972, they have at least established their due diligence with respect to him. However, their lack of diligence in general has not been effectively contradicted; they did not show that they could not have found out about Myer's alleged participation through other available sources. Furthermore, this point could only have been raised under Rule 59(e) within the days of June 25, 1973 and it was not.

Certain defendants dismissed out by the orders entered June 25, 1973 now move that there is no just reason to delay entering final judgments in their favor pursuant to F.R.C.P. 54(b). Plaintiffs have filed a conditional motion that, if we grant the defendants' motion, we make the same determination for all defendants dismissed out on that date. They object to defendants' motion, however, on the ground that it was untimely filed.

A strict thirty-day limit was invoked by the Seventh Circuit on plaintiffs' motion seeking a Rule 54(b) review

at an earlier stage of this litigation. *Schaefer* v. *First National Bank of Lincolnwood*, 465 F. 2d 234 (7th Cir. 1972). The court ruled that the thirty day period can be extended only when there is "extreme hardship where dilatoriness is not occasioned by neglect or carelessness".

Plaintiffs object that defendants' motion was not formally filed until July 27, two days after the thirty-day limit. However, the motion was in fact brought to chambers and stamped "Received" on July 24. It was not stamped "Filed" until the date the parties appeared on the motion call, in accordance with the practice of our clerk's office. The motion was therefore not untimely made.

In the alternative, should it be considered on appeal that defendants are bound by the date on which the motion was officially stamped "filed," we find and conclude that the failure to meet the July 25 deadline was a clerical error or misunderstanding and was not caused by neglect or carelessness. Otherwise defendants would be required to deliver their motion to the clerk within less than 30 days in order to have it heard and filed within 30 days.

On its merits, the defendants' motion should be granted. They seek to end their involvement in this litigation by way of limitations and not on the merits. This case is now four and a half years old and may continue for an indefinite period before it is concluded at the trial level. In these circumstances, we see no just reason why the defendants whom we have found not to be involved in the merits should remain in suspense concerning their ultimate liability or should be required to participate in any appeal involving the merits.

The plaintiffs' conditional motion for a Rule 54(b) order applicable to all defendants dismissed out by our orders of June 25 should also be granted. The non-moving defendants are in the same position as the movants, and an appeal from our orders, if any is taken, should cover all of these defendants.

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It is therefore ordered, adjudged and decreed that the judgment entered on June 25, 1973 dismissing the Amended Complaint as to the American Stock Exchange, Rodman and Renshaw, Inc., John Risetto, Al Vernieri, Edward Crooks, Frank Alter, Charles Myers, Wilbur Gorman, Arthur Dickholtz, Jerry Fogelman and David Fogelman is final, pursuant to F.R.C.P. 54(b).

ENTER:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court

Dated: September 13, 1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-2128

ROBERT SCHAEFER AND SANDRA SCHAEFER,
Plaintiffs-Appellants,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 364
Thomas R. McMillen, Judge

ARGUED SEPTEMBER 20, 1974—DECIDED JANUARY 30, 1975.

Before CASTLE, *Senior Circuit Judge*, FAIRCHILD and SPRECHER, *Circuit Judges*.

SPRECHER, *Circuit Judge*. Plaintiffs, private parties suing individually and as a class, appeal from unfavorable summary judgments and orders dismissing their complaint alleging common law fraud, violations of the Securities Acts and violations of the Sherman and Clayton Antitrust Acts.

The plaintiffs purchased Hercules-Galion Products, Inc. stock during a period of market manipulation between 1965 and 1967. They have based their civil claims on events which were grounds earlier for criminal prosecutions in the Southern District of New York. *United States* v. *Projanski, et al.*, 67 CR 729, *aff'd.*, 465 F. 2d 123 (2d Cir.

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1972). Named as defendants here were the criminal defendants and the non-indicted co-conspirators of the *Projansky* case[1] and a number of additional non-criminal parties, including several brokerage houses and their salesmen and others. The defendants who are appellees in this appeal include the brokerage house of Rodman & Renshaw; the American Stock Exchange (AMEX) and a group of its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; Charles F. Myers, the former president of Hercules-Galion Products, Inc.; Wilbur A. Gorman, chief operating officer of the brokerage house of Link, Gorman & Peck Co.; Arthur Dickholtz, an officer of the First National Bank of Lincolnwood; and Jerry and David Fogelson, partners in Investment Associates. These defendants successfully argued in the district court that the claims against them based on the Securities Acts were time barred and that the antitrust laws do not apply to securities market rigging schemes. Consequently, the district court dismissed the suit against them. These same contentions are at issue on appeal. We reverse in part and affirm in part.

I

The original complaint in this action alleged substantially the same events as were alleged in the criminal indictment returned in New York. The original complaint sought relief from common law fraud; violations of

[1] These are Irving Projansky, Harry Brainin, Gerald Leavitt and Michael Geier, the four appellants in *United States* v. *Projansky*, and Arthur Keller, Stuart Projansky (Irving's son), Fred Weitz, Mark Rolland, Spero Furla, Murray Peltz, Burton Buddy Kozak, Harris Nagorsky, Herbert Werman, Edward Wetzel, Zafe Zafer, and David Zisfein. Named as co-conspirators but not as defendants were Morris and Eva Childs, George Georges, Irving Taub, the First National Bank of Lincolnwood, and Argus Capital Corporation. *United States* v. *Projansky*, 465 F. 2d 123, 124, n.1 (2d Cir. 1972).

section 1 of the Sherman Act (15 U.S.C. §1), sections 1, 4, 5, 12 and 16 of the Clayton Act (15 U.S.C. §§12, 15, 16, 22 and 26); sections 15, 16, 17(a), and 22 of the Securities Act of 1933; (15 U.S.C. §§77o, 77p, 77g and 77v) and sections 9(a)(2), 10, 27 and 28 of the Securities Act of 1934 (15 U.S.C. §§78i, 78j, 78aa and 78bb).

In addition, however, to the sixteen criminal defendants and the six non-indicted co-conspirators, the plaintiffs named the seven brokerage houses employing some of the criminal conspirators. Among these was Rodman & Renshaw, the house which employed Harris Nagorsky, a Chicago broker who from the first figured prominently in the scheme, and Edward Wetzel. Rodman & Renshaw was generally charged in the original complaint with conspiring to defraud the plaintiffs. It was specifically charged with failing to supervise Nagorsky and thereby aiding and abetting the alleged conspiracy, fraud and stock manipulation. The plaintiffs broadened these claims in subsequent pleadings.

Briefly the facts are these.[2] Between July 1, 1965 and August 23, 1967, the sixteen criminal defendants conceived and executed a plan to manipulate the price of Hercules-Galion (Hercules) stock. By a furious promotion campaign, the group was able to raise the price of Hercules stock from $6 to over $14 per share. The heart of the scheme was for the defendants to regularly purchase from among themselves large blocks of Hercules stock on the AMEX at prearranged prices. The price was slowly raised by design, and as public interest and the price increased, the stock was sold and the profits taken.

After the criminal indictments were returned by a New York federal grand jury on August 23, 1967, the

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[2] For a complete history of the manipulation scheme consult the Second Circuit's recounting of the facts in *United States* v. *Projansky, supra* at 124-35.

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allegations were published immediately in many newspapers and news magazines. One and one-half years later, on February 19, 1969, the plaintiffs filed their original complaint. Of those now on appeal, only the defendant Rodman & Renshaw was named in the original complaint.

The first amended complaint was filed on July 25, 1969. Again, of the defendants here on appeal, only Rodman & Renshaw was named. Substantially the same allegations were repeated.

In the fall of 1969, both the plaintiffs and the defendants made the several pretrial motions. The plaintiffs moved for discovery and the defendants sought dismissal of the action. Discovery of the criminal defendants was stayed until their criminal trial was completed. The antitrust claims against the defendants were dismissed. The district court held that the securities acts allegations and the common law fraud allegations stated claims for relief. The court, applying the Illinois five year statute of limitations for fraud, also found the securities acts claims timely.

Subsequently, two events took place setting the stage for this appeal. The first was the end of the criminal trial wherein all of the indicted conspirators were convicted. Discovery resumed and proceeded on schedule, first with the taking of the depositions of the individual criminal defendants followed by that of the brokerage houses representatives. On October 18, 1972, the plaintiffs filed their amendment to the first amended complaint adding as defendants the AMEX, the specialists, and Myers, Gorman, Dickholtz and the Fogelsons. The second event was this court's decision in *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). In *Parrent* we held that Rule 10-b-5 actions were subject to the three year limitations period contained in the Illinois Securities Act.

At this point, Rodman & Renshaw and all the defendants added in the newly amended complaint moved for summary judgment in the light of the shorter limitations period announced in *Parrent*. The district court then found the three year period applicable and ordered the dismissal of all three counts, including the securities and common law fraud claims and the antitrust claims which had been re-alleged. This order was made final under Rule 54(b), FED. R. CIV. P., and is the subject of this appeal. The plaintiffs contend that their suit against Rodman & Renshaw as well as all the other non-criminal defendants is timely, and that the district court erred in dismissing all their claims against the defendants.

II

Plaintiffs contended that they have an implied right of action under section 10(b) of the 1934 Act and Rule 10b-5 and under section 17 of the 1933 Act. The defendants contended that plaintiffs' sole relief lies under section 9 of the 1934 Act. The original complaint stated a claim for relief averring market manipulation of the price of Hercules stock. The defendants argued that section 9(a)(2) specifically prohibits the conduct which the complaint alleges. Arguing that a claim may not be duplicated within the framework of a single act in derogation of its specific limitations, the defendants concluded that the claims based on Rule 10b-5 and section 17 may not be raised in this case.

A

Section 10(b) of the 1934 Act and Rule 10b-5 provide a private claim for relief from market manipulation.[3]

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[3] *See* 6 Loss, SECURITIES REGULATION 3869-73 (Supp. 2d ed. 1969); 3 Loss, SECURITIES REGULATION 1763 *et seq.* (2d ed. 1961). *Cf. Tcherepnin* v. *Knight*, 389 U.S. 332; *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Supt. of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

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Section 10(b)[4] and Rule 10b-5[5] have been liberally construed by the Supreme Court and include private actions arising from manipulative stock transactions. In *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1971), the Court recognized a private right of action where the claim for relief based on Rule 10b-5 arose from a stock rigging scheme. By fraudulently misstating the prevailing market price of Ute Distribution Corporation stock, the defendant bankers artificially depressed its purchase price. Once they bought the stock, the defendants then sold it at its higher, true market value. Finding this practice unlawful, the Court remarked on the scope of secton 10(b) and Rule 10b-5:

> These proscriptions, by statute and rule, are broad and, by repeated use of the word "any," are obvi-

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[4] Section 10(b), 15 U.S.C. §78j(b), provides:

> It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[5] Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

ously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.*, at 195. This was recently said once again in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). 406 U.S. at 151.

Similarly this Circuit has recognized a private implied right under 10b-5 where the defendant's conduct only threatened to create artificial market conditions. *Carroll* v. *First National Bank of Lincolnwood*, 413 F.2d 353 (7th Cir. 1969).

The remedies provided by section 10(b) as well as the other sections of the securities acts are cumulative and not mutually exclusive. In *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968), this Circuit took what it called the "direct approach" in allowing a private plaintiff to bring an action under Rule 10b-5 although the conduct alleged fell squarely within either section 12 of the 1933 Act or section 15 of the 1934 Act. The defendants contended that the plaintiffs attempted to avoid the limitations period of specifically applicable sections of the securities acts by making their claims under section 10(b) and Rule 10-b-5. The defendants went on to argue, as the defendants do here, that the specific sections were exclusive remedies.

Recalling the broad Congressional intent expressed in the language of section 10(b) and the serious remedial purposes of the Acts, the *Jordan* court concluded that the "remedies supplied by and under these acts are

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cumulative and not mutually exclusive." 401 F.2d at 51. By this same approach, the remedies afforded by section 9(a)(2) are not, as the defendants contend, the plaintiffs' sole remedy for market manipulation. The plaintiffs may make their claim for relief under Rule 10b-5 even though the alleged market rigging scheme also falls squarely within section 9(a)(2). Their remedies are cumulative. They may make their claim for relief under either or both or several sections of the acts.

In two cases the Securities and Exchange Commission found a series of stock transactions resulting in an artificial market to be violative of both Rule 10b-5 and section 9(a)(2). In *Adams & Co.*, 33 SEC 444 (1952), the Commission revoked the registration of two broker dealers when they conspired with a third person to raise the price of Mohawk Distillery stock by fraudulently creating apparent activity in the stock on the Chicago Board of Trade. The parties falsified records, reported false bids and offers and engaged in a series of prearranged sales and purchases at increasingly higher prices, causing the price of the stock to become artificially inflated. The Commission found simultaneous violations of sections 10(b), 17(a), 9(a)(2) and Rule 10b-5. In *Thornton & Co.*, 28 SEC 208 (1948), *aff'd sub nom. Thornton v. Securities and Exchange Commission*, 171 F.2d 702 (2d Cir. 1948), these sections were all found applicable to a single scheme of market manipulation. The facts which supported a section 9(a)(2) claim also gave rise to an equally valid Rule 10b-5 claim. We will leave it to the private plaintiff to make his claims under either Rule 10b-5 or 9(a)(2) or both. The allegations of the pleadings in the case contain elements of both. The Rule 10b-5 claim is therefore appropriate.

B

The defendants have attacked the sufficiency of plaintiffs' section 17 claim on the grounds that (1) no right of action can be implied under section 17 and (2) the parties are not in privity. The defendants' argument has

assumed that plaintiffs' Rule 10b-5 claim will be dismissed leaving section 17 to stand alone.

While there is authority in this Circuit for sustaining an implied right of action under section 17 alone,[6] we need not deal directly with this issue. There is an implied right of action under section 10(b) and Rule 10b-5. Judge Friendly's concurrence in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied, sub nom. Coates* v. *SEC*, 394 U.S. 976 (1968), often cited for denying implication, acknowledged that:

> Once it had been established . . . that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such an action under § 17—with the important proviso that fraud, as distinct from mere negligence, must be alleged. See Fischman v. Raytheon Mfg. Corp., 188 F.2d 783, 787 n.2 (2 Cir. 1951); Weber v. C. M. P. Corp., 242 F. Supp. 321, 322-325 (S.D.N.Y. 1965) (Wyatt, J.); Thiele v. Shields, 131 F. Supp. 416, 419 (S.D.N.Y. 1955) (Kaufman, J.). 401 F.2d at 867.[7]

Since fraud as well as negligence has been alleged and the section 10(b) claim established, plaintiffs' section 17 claim will be allowed to stand.

Similarly, we need not deal with defendants' contention that section 17 has a privity requirement. Where section 17 has been concurrently pleaded with a sufficient Rule 10b-5 claim, as here, courts forbear to rule on the sufficiency of the section 17 claim. 6 Loss, SECURITIES REGULATION 3913 (Supp. 2d ed. 1969).

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[6] *Surowitz* v. *Hilton Hotels Corporation*, 342 F.2d 596, 604 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966). *But compare Reid* v. *Mann*, 381 F. Supp. 525 (N.D. Ill. 1974), and authorities cited there.

[7] *See also Dauphin Corp.* v. *Redwall Corp.*, 201 F. Supp. 466, 469 (D. Del. 1962).

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III

Every defendant appealing here has contended that the statutory period within which to bring a Rule 10b-5 action is three years. Each has further contended that this period expired before the plaintiffs' filed their various complaints. Since the defendants stand in different factual circumstances, they must be dealt with separately.

This Circuit determined in *Parrent* v. *Midwest Rug Mills*, 455 F.2d 123 (7th Cir. 1972), that Rule 10b-5 and section 17 actions arising in Illinois were subject to a three year statute of limitations. Since no federal provision limits Rule 10b-5 actions, the *Parrent* court looked to the law of the forum state, Illinois, for the statute of limitations which best effectuated the policies of Rule 10b-5 and section 17. This was held to be the three year limitation found in section 13 of the Illinois Security Law.

The plaintiffs contend that Illinois' five year statute of limitations for fraud applies. Judge Decker applied this limitation at an earlier stage in this litigation before the *Parrent* case was decided. Subsequently Judge McMillen, succeeding Judge Decker in this action, found the three year limitation applicable on the basis of *Parrent*. The plaintiffs urged that the five year limitation is "the law of the case." They also argued that *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), precluded retrospective application of *Parrent*.

The doctrine of the law of the case did not bind Judge McMillen to apply the five year limitations period. Federal rule of the case doctrine is a rule of practice. It does not limit a court's power. *Messenger* v. *Anderson*, 225 U.S. 316, 319 (1922); *Drinan* v. *A. J. Lindermann & Hoverson Co.*, 238 F.2d 72, 74 (7th Cir 1956). A district judge has the power to undo the work of his predecessor

in the same action. *Boules* v. *Wilke*, 175 F.2d 35 (7th Cir. 1949).[8]

Although the parties there did not raise the issue of retroactivity, we applied *Parrent* retroactively in *Hupp* v. *Gray*, 500 F.2d 993 (7th Cir. 1974). Under *Chevron, supra*, the doctrine of nonretroactivity is applied when those invoking it receive favorable consideration on three separate factors. As set out by the Supreme Court these are:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe* v. *United Shoe Machinery Corp., supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections, supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra*, at 706. *Chevron* v. *Huson*, 404 U.S. at 106-07.

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[8] The rule of the law of the case may have a different effect upon a federal court in a diversity case where a state court has previously acted. *Barrett* v. *Baylor*, 457 F.2d 119, 123-24 (7th Cir. 1972).

The first factor for consideration is decisive. Although the statute of limitations issue was one of first impression in *Parrent*, the *Parrent* court did not overrule "clear past precedent." The court said:

> It is clear that under the resemblance test the three year limitation in Section 13, subd. D of the Illinois Securities Law (Ill. Rev. Stat. ch. 121 1/2, § 137.13, subd. D) applies to the 10b-5 actions stated in Counts I and II.
>
> The three year limitation is . . . closer to the express limitation periods in the various sections of the federal act . . . Furthermore, logic dictates selection of the three year Illinois limitation as tending more toward an orderly development of law, than reaching into a different Illinois Act (Ill. Rev. Stat. ch. 83 § 16) for the appropriate limitation. 455 F.2d at 127.

Before *Parrent*, circuit courts forced to choose between a state's fraud or Blue Sky statute of limitation used the "resemblance test" *Charney* v. *Thomas*, 372 F.2d 97 (6th Cir. 1967); *Vanderboom* v. *Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970). They looked to the limitations period of the state action which was most like section 10(b) or Rule 10b-5. Ruder, *Limitations on Civil Liability Under Rule 10b-5*, 1972 *Midwest Rug Mills, Inc.: Status of Limitations Under Section 10(b)*, 68 Nw. U. L. Rev. 162 (1973).

It is apparent from a reading of section 12 of the Illinois Securities Law (Ill. Rev. Stat. ch. 121 1/2, 137.12), for which section 13 supplies the three year limitation, that it closely parallels Rule 10b-5 and a study of the Illinois Securities Laws reveals a nearly identical aim. *Parrent, supra* at 127. Circuits which do not apply Blue Sky limitations either have higher standards for proof of scienter or dissimilar state securities statutes. Martin, *Statute of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 Bus. L. 443 (1974). Clearly, application of the Illinois Blue Sky limitations period

was foreshadowed, and in any event *Parrent* did not constitute an overruling of any clear past precedent of the Seventh Circuit.

Furthermore, following the rule in *Parrent* is not detrimental to the operation of Rule 10b-5 in this case inasmuch as the plaintiffs may and do call upon the mitigating doctrine of tolling. Equitable tolling is always available where fraud has concealed the wrong done. See part IV, *infra*. Since *Chevron* does not operate here, *Parrent's* three year limitations period applies retroactively.

IV

The defendants have challenged the plaintiffs' reliance on the theory of equitable tolling on two grounds: (1) that the tolling does not apply to claims based on negligence and (2) that the allegations of the complaints are insufficient to toll the limitations period.

A

Rodman & Renshaw, named a defendant along with six other brokerage houses in the original complaint of February 19, 1969, had employed Harris Nagorsky, one of the parties indicted in August 1967. During the period he was with Rodman, Nagorsky participated in the planning of the manipulation scheme, but he left in October 1965 before the scheme had run its course. Rodman contended that the limitations period ran from the time Nagorsky left its employ. This would mean that the original complaint was time barred by more than three months. The plaintiffs, however, claimed that the limitations period began to run in 1967. They argued that the period between 1965 and 1967 was tolled and that the statute of limitations did not begin to run until the alleged fraud was discovered when the New York indictment was returned.

Federal courts have long recognized the theory of equitable tolling in fraud actions. Clearly, it is available

to claimants in Rule 10b-5 actions. In *Parrent* the court said:

> We must read into the three year limitation applied in the Rule 10b-5 count the "equitable doctrine" that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part . . . ." 455 F.2d at 128.

In *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364, 375 (7th Cir. 1974), Chief Judge Swygert said:

> The equitable tolling doctrine provides that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud or in the exercise of due care should have obtained knowledge of the fraud. *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 396 (1945); *Morgan* v. *Koch*, 419 F.2d 993, 997 (7th Cir. 1969).

The federal tolling doctrine operates both against those who commit the alleged fraudulent acts and those who negligently facilitate fraud. The defendants have claimed that the tolling doctrine only operates against those who commit the fraud. They sought to find support in *Bryan* v. *United States*, 99 F.2d 549, 552 (10th Cir. 1938), *cert. denied*, 305 U.S. 661 (1939), and *Hayden* v. *Thompson*, 71 F.60 (8th Cir. 1895), both fraud actions. *Bryan* is no support because the fraud suit was dismissed upon the defense of sovereign immunity where the defendant employer was the United States Government. Application of the tolling doctrine to a negligent employer was not an issue. Neither does *Hayden* lend any support to the defendants' argument. In *Hayden*, the plaintiff, a customer, sued to recover fraudulently distributed dividends from a bank, its directors and shareholders. The court held that equitable tolling did not apply to one of

the bank's shareholders since neither a fraud nor a negligence claim had been alleged against him. The plaintiff's claims against the other shareholders and the directors were held to be timely on the theory of equitable tolling.

Equitable tolling embraces defendants such as Rodman & Renshaw who have facilitated by their negligence a Rule 10b-5 fraud. Chief Judge Swygert continued in *Hochfelder* v. *Midwest Stock Exchange*, *supra* at 375-76:

> If claims brought in the same posture as the instant action—asserting charges amounting to negligence but short of fraud—are to have any vitality, it cannot be contended that the tolling doctrine should not apply. Often the underlying fraud, carefully concealed in and of itself, would cloak the implementing actions of others. Accordingly, where the acts of a defendant facilitate the perpetration of a concealed fraud of another, the bar of the statute of limitations should not begin to run until a plaintiff obtains knowledge or through due diligence should have obtained knowledge of the underlying fraud.

This passage was cited approvingly in *Hochfelder* v. *Ernst & Ernst*, 503 F.2d 1100, 1119 (7th Cir. 1974), where equitable tolling was held to operate against the accounting firm of Ernst & Ernst for negligent facilitation and implementation of fraud although that firm was not chargeable with acts of fraud or fraudulent concealment.

Clearly, the action of Rodman & Renshaw fell within the ambit of equitable tolling. In their original claim for relief the plaintiffs alleged direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation. Even as equitable tolling works to prevent the defrauder from taking advantage of his wrongdoing, it also works to prevent the negligent person from taking advantage of his carelessness.

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B

The plaintiffs' allegation of fraudulent concealment is sufficiently specific to support a request for equitable tolling. The defendants contended that the plaintiffs merely alleged their ignorance of the fraud. They claimed that the plaintiffs must allege their own diligence as well.

When pleading Rule 10b-5 fraud, plaintiffs must comply with Rule 9(b), FED. R. CIV. P.[9] Once the underlying fraudulent practices are correctly pleaded, plaintiffs may then avail themselves of equitable tolling. The allegations of the pleadings here stated with particularity the circumstances of the conspiracy to defraud the purchasers of Hercules stock through market rigging. They were drawn primarily from the lengthy criminal indictment and were a detailed basis from which to claim fraudulent concealment. In paragraph 27 of the original complaint, the plaintiffs first alleged under the heading "Fraudulent Concealment" their own ignorance of the fraud until its discovery in 1967. They then stated:

> Plaintiffs and members of the class could not have discovered the combination, conspiracy, and other fraudulent acts at an earlier date by the exercise of due diligence since the combination, conspiracy, and fraudulent acts set forth herein had been fraudulently concealed by the defendants by various means and methods used to avoid the detection thereof.

In paragraph 25 of the first amended complaint they added:

> [T]he action is brought within one year after the discovery of the untrue statements and omissions of material facts alleged herein, and within one year

[9] "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be pleaded with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

> after such discovery should have been made by the exercise of reasonable diligence . . . .

Furthermore, throughout the pleadings plaintiffs gave details of the active, continuous concealment of the fraud and have supported with discovery testimony their diligence.

Clearly the plaintiffs have alleged all the necessary elements of fraudulent concealment. In *Baker* v. *F&F Investment,* 420 F.2d 1191 (7th Cir. 1970), the court laid down the proper test:

> In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. 420 F.2d at 1199.

The plaintiffs have expressly alleged that they did not know of Rodman & Renshaw's involvement until the criminal indictment in *United States* v. *Projansky, supra,* was returned in August 1967. All of the plaintiffs deposed testified that they first learned of the rigging scheme either upon the publication given to the indictment or later from friends or their attorneys. The plaintiffs also alleged and deposed that the criminal conspirators concealed the fraud from them. There is ample discovery testimony showing that the conspirators gave the plaintiffs with whom they directly dealt misleading information, hiding from them at all times the true nature of their stock transactions. This testimony also stands uncontradicted. Finally by implication as well as expressly, the plaintiffs have alleged that their delayed discovery of the fraud was not their fault. A complaint when tested by summary procedures must be given the benefit of every possible implication. *United States* v. *Crown Zellerbach Corp.,* 141 F. Supp. 118 (N.D. Ill. 1956).

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The discovery testimony of Robert Schaefer supported his claims. During the fall of 1965, he repeatedly telephoned Nagorsky and defendant Epstein and questioned them concerning the value and future of Hercules stock. The defendants have not put Schaefer's testimony into question.

Nor did the plaintiffs realize that Myers, Gorman and the Fogelsons might be participants in the manipulation scheme until 1972. These defendants were not indicted nor mentioned in the criminal indictment. In no way could the plaintiffs have known the part these defendants played until they had deposed the criminal defendants. Since discovery of the indicted conspirators was stayed until after their criminal trial, the plaintiffs were first able to take their testimony in the latter months of 1971. They did so promptly. By deposing Spero Furla, the plaintiffs learned of the meeting between five of the conspirators and Charles Myers, the president of Hercules-Galion, at the Hercules plant in the fall of 1965 after the market rigging plan had been put into operation. They also found that Myers was fully aware of the manipulation. By deposing Buddy Kozak, the plaintiffs learned of his activities while an employee of Link, Gorman & Peck and his relationship to its chief operating officer, Wilbur Gorman. By deposing Mark Rolland, they learned of David Fogelson's involvement.

In brief, the plaintiff's Rule 10b-5 claims against Rodman & Renshaw, Myers, Gorman, Dickholtz and the Fogelsons are timely.[10] The complaint as amended alleged with particularity the conspiracy to manipulate Hercules stock and stated all the necessary elements of defendants' fraudulent concealment. Equitable tolling must apply. The plaintiffs discovered the existence of

[10] The record is not clear as to whether Dickholtz and the Fogelsons were parties to the original order of dismissal dated June 25, 1973, but the district court expressly included them in the "clarification" order of September 13, 1973.

the fraud in August 1967. The three year limitations period commenced running then for Rodman & Renshaw. One and one-half years later, in February 1969, the original complaint was filed naming Rodman & Renshaw among other brokerage houses. The plaintiffs discovered the roles which Myers, Gorman, Dickholtz and the Fogelsons played between November 1971 and March 1972. The limitations period then began running for these defendants. Less than a year later, in October 1972, the plaintiffs amended the complaint and added their names as parties-defendant.

The district court's orders granting judgment on the pleadings to defendant Rodman & Renshaw and summary judgment to defendants Myers, Gorman, Dickholtz and the Fogelsons are reversed. The district court will have jurisdiction over the pendent common law fraud claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

C

Plaintiffs' action against the American Stock Exchange and its specialists is time barred. These defendants were first named in the amendment to the first amended complaint which was filed three and one-half years after the original complaint and more than five years after the criminal indictments. The plaintiffs contend that the AMEX and its specialists aided and abetted the manipulation scheme through lack of proper supervision.

The plaintiffs argued that they could only have discovered the AMEX's negligence after taking the following depositions from the brokerage houses:

> (1) Deposition of Defendant Hertz-Warner & Co. per Irving Hertz 6/27/72 pp. 19 et seq; and Henry Warner 6/27/72 pp. 83 et seq.
>
> (2) Deposition of Defendant Edward Wetzel 5/25/72, pp. 81 se seq. [sic.].
>
> (3) Deposition of Defendant Reynolds & Co., per Anthony H. Englese 6/29/72 pp. 53 et seq.

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(4) Deposition of Defendant Hornblower & Weeks. Hemphill, Noyes per William J. Lawlor, Jr. 8/1/72 pp. 59-61.

(5) Deposition of Defendant Link, Gorman & Peck per Wilbur A. Gorman 8/15/72 p. 21 and per June E. Carlson 7/6/72 pp. 69, 70. (Plaintiffs' Brief, p. 26.)

These depositions were taken after the criminal trial and after the plaintiffs had first deposed the criminal defendants. This discovery sequence, the plaintiffs believed, gave them a strategical advantage over the brokerage houses. Once the brokerage houses were deposed, the plaintiffs added the AMEX and its specialists to their list of defendants in October 1972.

The plaintiffs delayed discovery of the brokerage houses for too long. The criminal indictment stated that the criminal defendants were certified to trade securities on the AMEX, that they manipulated a stock registered with the AMEX, and that the manipulation took place on the floor of the Exchange itself. Also, the plaintiffs could have preliminarily deposed the brokerage houses on the behavior of the AMEX before the criminal trial. All of the depositions which the plaintiffs list above as essential to discovering the role which the AMEX and its specialists played during the stock rigging (except that of Wetzel) could have been taken before the criminal trial. The stay of discovery order was directed only to the indicted conspirators. Finally, gaining a strategical advantage is not a sufficient reason for delaying five years before naming these defendants. The sum of information the plaintiffs had concerning the AMEX before taking discovery of the brokerage houses was not increased by the 1971 and 1972 depositions. The three year limitations period had expired. The amendment to the first amended complaint came too late insofar as the AMEX and its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter, were concerned.

The order of the district court granting summary judgment to the AMEX and its specialists must be affirmed.

V

The district court properly dismissed the plaintiffs' antitrust claims. At the start of this action the plaintiffs included a claim under section 1 of the Sherman Act, 15 U.S.C. § 1. Judge Decker dismissed it against the original brokerage house and criminal defendants. *Schaefer* v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill. 1970). Subsequently, on the basis of Judge Decker's opinion, Judge McMillen dismissed it against the non-criminal defendants.

The plaintiffs contended that the conspiracy to create and maintain an artificial trading price for Hercules stock on the AMEX was price fixing and a per se violation of the Sherman Act prohibition against conspiracies and combination to fix and maintain the price of goods in interstate commerce. The plaintiffs argued that the district court should not have dismissed the antitrust claims because the defendants' manipulatory practices fall within the literal language of the Sherman Act.

Securities exchanges do not enjoy a blanket exemption from the antitrust laws. In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court held that the antitrust laws do apply to exchanges and made such an assumption the starting point for any analysis of a conflict arising from their collision with the securities laws. The Court said at 357:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198; see *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439,

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456-457; *California* v. *Federal Power Comm'n*, 369 U.S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

In fact, the antitrust laws are a necessary complement to the regulatory scheme of the securities acts. As the *Silver* Court said:

> Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. 373 U.S. at 359.

Although the *Silver* case was distinguished, its further operation was seriously questioned by the Supreme Court's opinion in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), holding that an antitrust action against a commodity exchange should be stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the exchange was in compliance with the applicable statute and with exchange rules. *See also Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

Private parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review. In *Silver*, the Court allowed a private antitrust suit because the Securities and Exchange Commission was not granted any statutory means under the securities acts for reviewing a New York Stock Exchange order terminating direct wire telephone connections with non-members. The Court added in a footnote (358, n.12) that "[w]ere there Commission jurisdiction *and ensuing judicial review* for scrutiny of a particular exchange ruling . . . . a

different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity ...." (emphasis added).

The plaintiffs here have a forum for review unlike the plaintiffs in *Silver*. The plaintiffs have chosen to make claims both under section 10(b) and section 17 of the securities acts and under the antitrust laws.

By electing to make their claim for relief under the securities acts, the plaintiffs have rendered their antitrust claims superfluous. The sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts. 3 Loss, Securities Regulation 1529-70 (2d ed. 1961). The plaintiffs' Sherman and Clayton antitrust claims are dismissed for these reasons and for those appearing in Judge Decker's opinion, 326 F. Supp. 1186, 1190-92.

In summary, (1) we affirm the district court's dismissal of Count II (antitrust claims) as to all parties; (2) we affirm the district court's dismissal of Counts I (securities acts claims) and Count III (common law fraud claims) as to the American Stock Exchange, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; but we reverse the court's dismissal of Counts I and III as to all other defendants. The case is remanded for further proceedings consistent herewith.

Reversed in part: Affirmed in part: and Remanded.

FAIRCHILD, *Circuit Judge*, concurring. I agree in almost all respects with the opinion ably written for the court by Judge Sprecher. With respect to Part V (dismissal of the antitrust claims), the most persuasive argument seems to me to arise out of the contrast between the relevant language of the Securities Exchange Act and that of the antitrust laws. Although it is arguable whether or not, before the enactment of the Securities Exchange Act, the manipulation specifically described in §9(a)(2), 15 U.S.C.

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§78i, fell within the far more general language of §1 of the Sherman Act, 15 U.S.C. §1, the later enactment not only specifically described the activity (expressly including acting "with one or more other persons," as well as "alone") and declared it unlawful, but in §28(a), 15 U.S.C. §78bb(a), very closely limited the recovery for violation, i.e., actual damages under the Securities Exchange Act, contrasted with treble damages under the antitrust laws, 15 U.S.C. §15. Under all the circumstances, it seems to me the more logical conclusion that the later enactment was either an implied amendment of the earlier, or was itself recognition by Congress that the activity described in §9(a)(2) of the Securities Exchange Act had not previously been prohibited by the antitrust laws.